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No. 72

IN THE

Supreme Court of the United States

October Term, 1955

FRANK COSTELLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

On Application for Writ of Certiorari

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1. The government's argument on the first question (Brief, pp. 7-12) entirely ignores the recognition by the Court below that there is a conflict between its decision and other decisions which should be resolved by this Court (Petition, pp. 43, 48, 49). Judge Hand considered the Eighth Circuit cases as in conflict with his opinion and Judge Frank cited these and some of the other cases cited by us in our petition. Both opinions acknowledge that the question is still undecided in this Court and Judge Frank in his concurrence said: "* * * I reluctantly concur, with the hope that the Supreme Court will review our decision and consider the question" (Petition, p. 49).

Petitioner was not permitted to see the grand jury minutes, but the Court of Appeals said of the three witnesses who appeared before the grand jury: "Those who had appeared had had no personal acquaintance with Costello or his affairs; they were accountants or experts and we

find it impossible to escape the conclusion that their computations must have been based on hearsay" (Petition, p. 41).

In concluding Judge Hand said: "* * * and we hold that we may not escape decision whether it is ground for dismissing an indictment that all the evidence adduced at the inquest was hearsay" (Petition, pp. 42, 43).

The suggestion (Brief, p. 8) that the evidence presented to the grand jury was evidence which "would be competent and admissible at the trial" and the citation of *United States* v. *Johnson*, 319 U. S. 503, rests upon a complete misunderstanding of our contention. Petitioner is not claiming that the indictment should be dismissed because the evidence of experts was received. He is contending that it should be dismissed because that was the only evidence received. Clearly, where a proper foundation has been laid by independent testimony an expert may assist the jury either by expressing an opinion about the evidence or by summarizing that evidence. The latter was the situation in the *Johnson* case where, as this Court was careful to point out,* the evidence which underlay the expert's testimony was independently established and available to the jury for its consideration. Our complaint in the case at bar is that before the grand jury no such evidence was produced. In other words, the experts summarized material which they had obtained at second hand, not material concerning which testimony was produced before the grand jury.

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* *United States* v. *Johnson*, 319 U. S. 503 at page 519.

Equally without basis is the contention (Brief, pp. 8-11) that the Eighth Circuit had abandoned its previously long-settled rule in *Banks* v. *United States*, 204 F. 2d 666. It is true that in that case the only evidence before the grand jury was that of a government agent. But it is not true, as the government appears to suggest, that this was all hearsay evidence. For in that case, in contrast with this, the government agent, McKusick, who testified before the grand jury was one who had himself obtained admissions from the defendant or his agents, had examined and identified some of the documents and had first hand knowledge of the facts (see Record and Government's Brief in *Banks* case).* Here the only agent who had interviewed petitioner, Ronayne, did not testify before the grand jury (1783).

It is evident, therefore, that in the *Banks* case there was some competent evidence before the grand jury. That case illustrates the principle described by Judge Hand in the opinion below to the effect that the vice of incompetent evidence before a grand jury has by some courts been considered cured by a small quantity of competent evidence. In the *Banks* case that existed. Here it did not. The conflict, therefore, still remains.

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* *Banks* v. *United States*, Record on Petition for Certiorari, October Term 1958, pp. 332, 333, 345-346, 348, 349, 350-352, 353, Government's Exhibits 70, 71, pp. 309, 311, 312, 315, 317, 354, 359, 380-381, and Brief of Government in opposition to Certiorari in *Banks* case, p. 12, and footnote 4.

In that brief the Government said:

> "It is clear that Mr. McKusick could have testified from first hand knowledge as to substantially all of the probative evidence in the case."

Moreover, in concentrating on the Eighth Circuit the government ignores the fact that District Court judges in several different Circuits (see cases cited, pp. 10, 11 of our Petition) have expressed the opinion that an indictment based on incompetent evidence is improper and in one of those cases the indictment was quashed because it rested on hearsay evidence.* And no case has been found taking the view of the Court below here. The issue is one of great importance and should be resolved by this Court.

2. In discussing the problem arising from the Trial Court's refusal to permit cross examination about the earlier assessments, the government states (Brief, p. 13 and footnote 6) that Leath had personal knowledge of the basis of these. The record does not justify that statement. Leath conducted the investigation that resulted in the indictment here under review, but he expressly stated that he had had nothing to do with the earlier assessments (1500).** His comments on them are purely argumentative, at the most, hearsay. For when asked about these earlier assessments he said: "This, sir, I believe is a revenue agent's report not prepared by me" (1500). When it came to the question of net worth-expenditures method the record shows that this was elaborated in discussion between government counsel and the Court (1502-1505) and the witness took part in this discussion (1515, 1516). But all of this was in the absence of the jury (1502-1539).

United States v. *Rubin*, 218 Fed. 245.

** The statement in the Government's brief citing page 1398a of the Record that Leath "was in charge of the investigation" overlooks the fact that the investigation referred to was for the indictment years 1946-1949, whereas the assessments in question were for the years 1941-1945.

It is thus incorrect to suppose, as the government suggests, that the exclusion of the assessments for the years 1941-1945 was based on a judicial finding on "uncontradicted testimony" (Brief, p. 13). There is no judicial finding of fact. The Court merely accepted the prosecutor's argument that if the assessments went into evidence he could explain them away. But on this question petitioner was entitled to the jury's determination and not that of the prosecutor or the trial judge. *Ford* v. *United States*, 210 F. 2d 313 (C. A. 5th), is not distinguishable and creates a conflict with the decision below in the instant case.

3. The government (Brief, pp. 14-17) is evidently dissatisfied with the Court of Appeals' finding that there was substantial cash on hand on January 1, 1946 and seeks to reargue that question. We submit that is entirely improper. But if there is any basis for such a position, then clearly this Court should grant certiorari. Only on a full hearing can that subject be adequately disposed of.

We are at a loss to understand the government's statement (Brief, p. 15) that the Court of Appeals' analysis showed that the cash could not reach to 1948 and 1949. With all deference we suggest that that Court did no such thing. It could not possibly have had any basis for knowing which elements of the government's case the jury accepted. And without such knowledge a fund of $40,000 might have reached even beyond 1949.

If, as the government suggests (Brief, p. 15) there was a "speculative doubt", this affects the entire case. For it is pure speculation to suggest (Brief, p. 17) that since petitioner was a man of "powerful undisclosed influence",

that might have been profitable to him in ways other than those which he reported, or that because he reported winnings from wagers in 1948 and 1949 in certain amounts, these might have been larger. Surely this Court, when speaking of a "likely source" in the *Holland* case, did not mean that a man could be sent to jail for a term of years because he reported income from a particular source. That would have made this Court's injunction in that case entirely meaningless whenever a man reported any income at all. We submit that the correct rule is that laid down by Judge Yankwich, referred to in our Petition (p. 18).

And the government, in arguing (Brief, p. 17) that the funds spent could not have come from a prior accumulation, repeats its disregard of the Court of Appeals' finding. For it must be borne in mind that what the government is now saying about 1948 and 1949 it originally said also about 1946 and 1947. It was wrong then and is equally wrong now.

We respectfully submit that this case brings up for review questions which are extremely important and which have not previously been decided by this Court, and that on two of these questions there is a direct conflict between the Circuits.

Respectfully submitted,

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